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The Contest for Power in Delegated Rule-Making

Ever since the Lisbon Treaty introduced the new provisions on delegated rule-making under Articles 290 and 291 TFEU, the newly created institutional rules have undergone change. Some of the changes have occurred openly in the formal political arenas, and have been contested by the relevant actors, i.e. Council, European Parliament (EP) and Commission. By contrast, other changes have occurred in a more covert or invisible way, unfolding after the adoption of a formal rule in the course of its application, and may therefore be formalized at a later stage. We are focusing on the latter type of institutional change and its consequences and ask ‘Under what circumstances does ‘interstitial’ institutional change occur, what are its dynamics and its consequences?’

1 The theoretical argument

Building on Farrell and Héritier¹ and Héritier,² we define interstitial institutional change as informal institutional change which occurs between two formal rule revisions. For example, at time t_1 a committee may initially formally agree that all of its decisions will be made by a unanimous vote; progressively, and informally, it may then accept some delegation of decision-making powers to individual members; and finally, and formally, at time t_2 it may reconvene to discuss the decision-making rule it will follow. Interstitial institutional change is the second step in that sequence, i.e. the informal step taken between t_1 and t_2 . Clearly, what happens then may have an important impact on the decision at t_2 . The study of this type of institutional change is therefore relevant from a theoretical point of view because it informs the burgeoning literature on the nature of institutions and the conditions for institutional change. In addition, it is topical from a societal/democratic stance because, if interstitial institutional change carries the promise of flexibility and efficiency, it may also lead to severe limitations in the operation of formal checks and balances.

Our argument in this paper is that interstitial institutional changes are happening as a result of the application of Articles 290 and 291 TFEU. We build on the *theory of continuous institutional change* in order to capture interstitial institutional change.³ It emphasizes the renegotiation or re-interpretation of incomplete institutional rules and policies. Institutional change emerges once a formal political decision of integration has been taken and this

¹ Henry Farrell and Adrienne Héritier, ‘A rationalist-institutionalist explanation of endogenous regional integration’, *Journal of European Public Policy*, 12(2) (2005): 273–90.

² Adrienne Héritier (2008: 47)

³ Adrienne Héritier, ‘Policy-making by subterfuge: interest accommodation, innovation and substitute democratic legitimation in Europe - perspectives from distinctive policy areas’, *Journal of European Public Policy*, 4(2) (1997): 171–89; Adrienne Héritier, *Explaining Institutional Change in Europe* (Oxford: Oxford University Press, 2007); Adrienne Héritier, ‘Institutional Change in Europe: Co-decision and Comitology Transformed’, *JCMS: Journal of Common Market Studies*, 50 (2012): 38–54; Henry Farrell and Adrienne Héritier, ‘Formal and Informal Institutions Under Codecision: Continuous Constitution-Building in Europe’, *Governance*, 16(4) (2003): 577–600; Henry Farrell and Adrienne Héritier, ‘Interorganizational Negotiation and Intraorganizational Power in Shared Decision Making’, *Comparative Political Studies*, 37(10) (2004): 1184–212; Jeffrey Stacey and Berthold Rittberger, ‘Dynamics of formal and informal institutional change in the EU’, *Journal of European Public Policy*, 10(6) (2003): 858–83.

decision constitutes an incomplete contract. This offers the possibility of it being renegotiated and specified in the course of its application. The explanation is based on the assumptions of goal-oriented, boundedly rational actors, seeking to maximize their institutional power and thereby their power over policy outcomes. Answers to why patterns of deepening integration appear may be derived from the pressure of external problem, specific institutional conditions and the relative bargaining power of the actors involved when redefining incomplete institutional or policy rules.

Given problem pressure and a demand for coordinated policies - it is crucial whether decisions to coordinate at the higher level represent complete or incomplete contracts. If actors have similar preferences and agree on a detailed decision to upload competences to the higher level which also clearly circumscribes the power given to supranational actors, a limited transfer of powers has occurred in a complete contract and in an overt way in the main political arena. If, by contrast, member states have diverse preferences on the desired policy solutions and appropriate limits of supranational power, the outcome of the decision process in the main arena is likely to be vaguely formulated (an incomplete contract) and/or at the lowest common denominator. An incomplete contract – for strategic reasons and reasons of substantive uncertainty⁴ – leaves many details to be specified, and thereby opens the door for subsequent institutional and policy changes.⁵ These changes often happen outside the formal political arena. The renegotiation may give rise to informal rules on the handling of powers emerging alongside the formal political arena. The outcome of the implicit re-bargaining of the incomplete contract will be determined by the most powerful actors (as defined by their fall-back position), the existing decision-making rule and exogenous events. When specifying the incomplete contract, supranational executive actors may form an alliance with judicial actors in interpreting the details of the contract and – through court rulings - make an inroad into competences previously not formally mandated.

In short, a deepening integration may result from the fact that – given external pressure - diverging preferences and consensus or unanimity rules make the formal political decision-makers commit themselves to only vaguely formulated institutional rules or policy goals. Given the ambiguity of the rule or policy mandate, implementing actors, i.e. executive actors, and judicial actors, as well as political actors at the national level, are able to redefine the generally stated goal. Depending on the preferences and the relative power of the actors involved in the re-negotiation of the incomplete contract and given institutional restrictions, deepening integration may ensue.⁶ This leads to the conjecture that

“An incomplete institutional rule or policy may lead to an institutional change in the course of its application. In the renegotiation of the incomplete institutional rule, the preferences of the most powerful actors will be reflected in the substance of the modified institutional rule.”

⁴ Alexander Cooley and Hendrik Spruyt, *Contracting States: Sovereign Transfers in International Relations* (Princeton, N.J.: Princeton University Press, 2009).

⁵ Adrienne Héritier, *Explaining Institutional Change in Europe* (Oxford: Oxford University Press, 2007); Héritier 2012.

⁶ Adrienne Héritier, *Explaining Institutional Change in Europe*. Oxford: Oxford University Press, 2007).

2 Incomplete institutional rules: Articles 290 and 291 TFEU

The Treaty on the Functioning of the European Union (TFEU, 2012) distinguishes between legislative delegation and executive delegation for the first time, and provides for two separate procedures for “delegated acts” and “implementing acts”.⁷ Under Article 290 TFEU, the Commission – by legislation – may be delegated the power to adopt “delegated acts” of general scope supplementing or amending certain non-essential elements of the legislation in question. The legislators must explicitly define the objective, content, scope and duration of this delegation. They also can choose the mechanism(s) used to control the Commission when it applies these delegated powers, revocation and objection. In the case of revocation, either the Council or the Parliament may revoke a delegation. Similarly, an objection on the part of either the Council or the Parliament would prevent an individual “delegated act” from entering into force.⁸

The new provisions of the Lisbon Treaty leave open many questions as to how delegated acts (Article 290 TFEU) and implementing acts (Article 291 TFEU) should be applied. In other words, the provisions constitute an incomplete contract. We assume that actors seek to take full advantage of their institutional power in order to maximize their influence over policy outcomes; we further assume the following meta preferences of the institutional actors involved: the Commission will in general prefer extensive delegation over delegation with minimal or no control by member states and the EP. The EP will prefer legislation over delegation because it can wield more influence than under delegation (in particular in the case of implementing acts); if delegation has been chosen, it is assumed to prefer delegated acts over implementing acts. The Council will generally prefer delegation over legislation under co-decision since it has to share power with the EP under co-decision; if delegation has been chosen, it will prefer implementing acts over delegated acts because it does not have to share power with the EP and member states can still wield influence in the committees under implementing acts. From these assumed preferences we conclude that when the Commission proposes a “delegated act”, as a rule a conflict ensues between the Parliament, the Council and the Commission. The Council seeks to oppose it entirely or to reduce its scope, or to translate it into an implementing act. The EP will welcome the use of a delegated act and conversely oppose the use of implementing acts. Given these conflicts⁹ frequently, in order to come to an agreement packages are struck across various issues as to whether to use “delegating” or implementing acts.¹⁰

Hence the guiding question we pose when scrutinizing four empirical cases is: How were the institutional rules on the application of delegated and implementing acts interpreted and renegotiated in these specific cases? Which issues were at stake and how were they resolved?

⁷ Paolo Ponzano, ‘La Nouvelle Comitologie et les Actes Délégués’, Mscr., Workshop RSCAS, EUI, Florence, 11/12 February 2010.

⁸ See also Jens Blom-Hansen, ‘The EU Comitology System: Taking Stock Before the New Lisbon Regime’, *Journal of European Public Policy*, 18(4) (2011): 607–17.

⁹ Adrienne Héritier, Catherine Moury, Carina S. Bischoff and Carl Frederik Bergström, *Changing Rules of Delegation: A Contest for Power in Comitology* (Oxford: Oxford University Press, 2013).

¹⁰ Interview Commission, Jan. 2012.

Methodologically, the four cases discussed do not claim to conduct a systematic empirical scrutiny but only seek to probe the plausibility of our general argument: *“An incomplete institutional rule may lead to an interstitial institutional change in the course of its application. In the renegotiation of the incomplete institutional rule, the preferences of the most powerful actors will be reflected in the substance of the new modified institutional rule.”* The first part of the empirical analysis will focus on the strategic interaction between the Commission, the Council and the European Parliament (EP) in renegotiating the ambiguous institutional rules governing delegation under the Lisbon Treaty. In the second part, an additional institutional player, the national parliaments, enters the stage to renegotiate the ambiguous institutional rules about how to apply delegated and implementing acts under the Lisbon Treaty.

3. Empirical cases

3.1. The contest of power between the Commission, the Council and the EP

Case 1: The Regulation on the Prevention and Correction of Macroeconomic Imbalances

The first case focuses on the conflict between the Commission, the Council and the EP in the definition of the economic indicators under the scoreboard regime as part of the preventive arm of the Prevention and Correction of Macroeconomic Imbalances.¹¹ The conflict over the interpretation of the legal rules when deciding how to flesh out the scoreboard regime, i.e. the indicators used to measure and monitor macroeconomic and macrofinancial imbalances, gave rise a new informal rule (set out in the recital of the regulation and not in the legal text), about how to specify the formal rule which, however, due to the political importance, became de facto binding.

Macroeconomic Imbalances Procedure is based on two legislative acts.¹² One regulation defines the details of the new surveillance procedure and covers all member states. Another regulation, which introduces an enforcement mechanism and possible sanctions, is only applicable to the members of the euro area. Under the new surveillance procedure for the identification of possible imbalances, a two-step approach has been established. An alert mechanism seeks to provide early warning of signs in some member states of macroeconomic imbalances which require in-depth investigation. “The objective is to identify macroeconomic imbalances at the early stage of their emergence so that necessary policy actions can be taken in due time and thus prevent the development of severe imbalances which are damaging for the Member State concerned and risk jeopardising the functioning of

¹¹ Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances.

¹² Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances. Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area

the euro area.”¹³ The alert mechanism serves as an instrument of scrutiny, as a first step before a more in-depth inquiry which may then be followed by concrete policy recommendations.

More specifically, the alert mechanism provides for a scoreboard based on indicators complemented by an economic reading thereof presented in an annual Alert Mechanism Report (AMR). The economic reading of the scoreboard indicators implies that there is no automaticity involved and that other relevant information can be taken into account. The indicators in the scoreboard focus on the most relevant dimensions of macroeconomic imbalances and losses of competitiveness, with particular focus on the smooth functioning of the euro area. “For this reason, the scoreboard consists of indicators which can monitor external balances, competitiveness positions and internal imbalances, and encompass variables where both the economic literature and recent experiences suggest associations with economic crises.”¹⁴ A wide range of policies are included when addressing the issue of imbalances, including fiscal policies, financial market regulation or structural reforms. The latter are meant to increase the flexibility of product and labor markets, facilitating adjustments through changes in relative prices and wages together with the reallocation of labor and capital in the economy.¹⁵

The results of the Alert Mechanism Report are discussed in the Council and Euro Group and, if deemed necessary, the Commission is empowered to decide which countries require in-depth reviews. If a review reveals a macroeconomic imbalance, the Commission will propose policy recommendations for the member state in question. In the preventive arm, these proposals are part of the recommendations under the European semester. If the Commission comes to the conclusion that there are severe imbalances, it will recommend an excessive imbalances procedure to the Council; this is part of the corrective arm of the new procedure.¹⁶

Some vague provisions were introduced in the Regulation on the Prevention and Correction of Macroeconomic Imbalances that needed specification through delegated legislation. In the interpretation of these incomplete institutional rules, a conflict emerged over the choice of either delegated acts (Article 290 TFEU) or implementing acts (Article 291 TFEU). When deciding how to flesh out the scoreboard regime, i.e. the indicators used to measure and monitor macroeconomic and macrofinancial imbalances, the Commission first proposed to define these indicators on its own. Following resistance from both the Council and the EP, the Commission and the EP proposed “delegated acts” (Article 290 TFEU) whilst the Council wished to use an implementing act (Article 291 TFEU). A deadlock ensued and after a round of negotiations this led to the use of an informal new type of procedure which is *neither*

¹³ Pieter Bouwen and Jonas Fischer, ‘Towards a Stronger EU Surveillance of Macroeconomic Imbalances: rationale and design of the new procedure’, *Reflets et perspectives de la vie économique* 51(1) (2012), 21-31 at 25.

¹⁴ The scoreboard (indicators and thresholds) include a combination of stock and flow indicators which can capture both shorter-term rapid deteriorations as well as the longer term gradual accumulation of imbalances. Bouwen and Fischer at 25.

¹⁵ Ibid at 29.

¹⁶ Ibid at 26.

Article 290 TFEU *nor* Article 291 TFEU, the “compromise”. The respective recital 12 of the Regulation says

“The Commission should closely cooperate with the European Parliament and the Council when drawing up the scoreboard and the set of macroeconomic and macrofinancial indicators for Member States. The Commission should present suggestions for comments to the competent committees of the European Parliament and of the Council on plans to establish and adjust the indicators and threshold. The Commission should inform the European Parliament and the Council of any changes to the indicators and threshold and explain its reasons for suggesting such changes.”

Note the difference to the “real” use of a delegated act used in another six-pack regulation on the effective enforcement of budgetary surveillance in the euro area.¹⁷ As prescribed in the Comitology Regulation of 2010, it states that the Commission shall be empowered to adopt “delegated acts” regarding the criteria establishing fines, procedures for investigations (Article 8.4); that the Commission shall draw up a report in respect of the delegation of power; and that the delegation may be revoked at any time by the Parliament or by the Council (Article 11.2, and 3).

What is striking from our theoretical perspective of interstitial institutional change is that the existing formal rules constitute ambiguous terms of contract, which in the situation of a decision stalemate - were re-bargained and transformed so as to overcome the impasse. By so doing, the power of the Commission was clearly strengthened.

However, renewed conflicts emerged in the further application of the transformed institutional rule. The EP considers that the compromise solution does not work out well and it does not feel fairly treated by the Commission. It states in its resolution of 2013: the EP “... notes with deep regret a lack of equal treatment of the co-legislators in this process, as the Commission reportedly consulted the relevant working group of the Council.” More specifically in November 2012 the Commission added a new financial sector indicator on the growth rate of financial sector liabilities to the original set of indicators. The EP welcomed this addition and had in fact asked for it in December 2011. However, they accused the Commission of not having respected the Six-pack rules requiring that the Commission should propose suggestions for comment to the EP and the Council when establishing and adjusting indicators and thresholds. The EP argued that it had not been properly consulted. To make matters worse, the EP accused the Commission of having consulted the Council at the technical level through the EcoFin Council. In short, as the chair of the Economic and Monetary Affairs Committee of the EP concluded in the Parliamentary Debate on this issue “...the message seems not to have quite trickled through yet to the relevant Commission services that Parliament has equal rights with the Council here.” (Sharon Bowles, Parliamentary Debate 18.4.2013)¹⁸. The Commission responded by affirming that it had acted

¹⁷ Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 Nov. 2011 on the effective enforcement of budgetary surveillance in the euro area.

¹⁸ Debates - Thursday, 18 April 2013 - Completing the scoreboard for the Macroeconomic Imbalance Procedure (debate) 10/02/14 21:25 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=->

in accordance with the relevant Regulation and in pursuit of a political agreement with the Council and Parliament of 2011 for completion of a scoreboard with an eleventh indicator...: ‘The Commission shall assess on a regular basis the appropriateness of the scoreboard, including the composition of indicators, the thresholds set and the methodology used, and it shall adjust or modify them where necessary.’ It emphasized that there had been close cooperation with the Council and Parliament, as mentioned in the modified new institutional rule (Recital 12). It argued that the Commission had treated the EP and the Council in the same way and informed them at the same time since the Commission had taken into account the views provided by the EP’s Economic Policy Committee which has a mandate to ‘provide advice to the Commission’.¹⁹

This on-going struggle about the correct application of the already modified institutional rule (Recital 12) shows that this interstitial rule, in turn, proves to be incomplete and offers opportunities for the actors involved to assert the relative institutional power over how to apply the modified rule in a specific case.

Case two: Financial Instruments External Relations: Pre-accession IPA II

In December 2011, the European Commission (EC) published the “Global Europe” Communication and a package of proposals for EU instruments for external action for the 2014-20 period. The instruments are set in the context of the recently agreed Multiannual Financial Framework (MFF) 2014-20, under its heading 4 with resources of €66.3 billion, or 6.12% of the total. This is a 3% increase on the previous MFF, but 16% less than the EC’s initial proposal. The main legal basis for the instruments for external action are Articles 209(1) TFEU (development cooperation programmes) and 212(2) TFEU (economic, financial and technical cooperation with other third countries). The agreement on the MFF is applicable from 1 January 2014.

The legislative package comprises nine geographic and thematic instruments, and a horizontal regulation defining common implementing rules for six of them: Instrument for Pre-accession Assistance (IPA II); European Neighbourhood Instrument (ENI); Partnership Instrument for cooperation with third countries (PI); Development Cooperation Instrument (DCI); Instrument for the Promotion of Democracy and Human Rights (EIDHR); Instrument contributing to Stability and Peace (IPS)²⁰.

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<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-188> Page 2 of 2.

¹⁸ Ibid.

²⁰ As a result of the inter-institutional negotiations, Commission's original proposal for the title (Instrument for Stability, IPS) was changed to Instrument contributing to Stability and Peace (IPS).

Under the Lisbon Treaty, External Relations have been subject to the ordinary legislative procedure (co-decision) for the first time, hence implying new powers for the EP. As a consequence, in negotiating the specifics of Articles 290 and 291 TFEU in their application to External Relations, all actors, i.e. the Commission, the Council or the member states and the EP were treading on institutionally new ground and very cautiously negotiated the specifics of the application of Articles 290 and 291 TFEU to the Financial Instruments of External Relations.²¹ As we argued in the theoretical section: we assume that all actors are intent on maximizing their institutional power in order to have influence over policy outcomes. Hence we proposed that *“An incomplete institutional rule may lead to an interstitial institutional change in the course of its application. In the renegotiation of the incomplete institutional rule, the preferences of the most powerful actors will be reflected in the substance of the newly modified institutional rule.”*

How is this proposition reflected in the empirical story²² of the application of Articles 290 and 291 TFEU in the case of the financial instruments external relations?²³

The Common Implementing Rule:

The Commission proposed a *common implementing regulation*, i.e. a horizontal regulation defining common, simplified rules and procedures for all external action instruments. The Commission's financing decisions will take the form of action programmes based on multiannual programming documents. Moreover, the Commission may set specific rules for some instruments (e.g. IPA II). The regulation also sets out the conditions for access to assistance. The common regulation and each instrument will be reviewed at the end of 2017.

In the political decision making process on the common implementing regulation, the Common Rule was negotiated at a high level among the Chair of Parliament's Foreign Affairs Committee, the Council presidency (Coreper ambassador), and the Commission. The Council proposed not to use delegated acts (Article 290 TFEU) while the EP insisted they were used. In other words, it asked for all the Commission's strategic papers for individual countries (valid for seven years) to be subject to delegated acts under Article 290 TFEU. It argued that strategic choices on important objectives for specific countries would be defined in this implementation phase. This, the EP argued, constitutes a political process in which the EP (and the Council) should be involved. It further stressed that, given the seven year commitment, the EP and the Council as co-legislators should be able to make a mid-term reflection on these priorities at, i.e. after three and a half years. By this time, circumstances could have changed and therefore priorities would have to be reconsidered. It also argued that the outgoing EP should not commit the future EP members for seven years without allowing them to make an intermittent review.

Both the Commission and the Council rejected the EP's request and the Commission emphasized that pure implementation issues were at stake. After one and a half years of

²¹ Interview EP January, February 2014.

²² Interview EP January, February 2014.

²³ We would like to thank Ricardo Rodrigues for collecting documentary materials on this case.

negotiations, a compromise was struck at the end of 2013. The EP had to renounce its request to use delegated acts for all strategic papers. But it was conceded that delegated acts can be used in the annexes or in the text of the instrument itself when thematic priorities should be changed. In a mid-term review in 2017, the Commission will need to inform the EP and the Council on the state of affairs. And, crucially, any potential change of thematic priorities during the mid-term review will be subject to a so-called “*amending delegated act*” as opposed to a “*self-standing delegated act*”. In formulating such a decision and in accordance with the inter-institutional framework agreement, EP representatives are invited by the Commission to informally give their views on the draft.

In conclusion, renewed negotiations took place in view of the ambiguity of how Articles 290 and 291 TFEU should be employed in the case of the Financial Instruments External Relations *Common Rule*. In these negotiations a compromise was struck between the Commission and Council on the one hand and the EP on the other in which all involved actors made concessions. The outcome was the emergence of a new type of delegated act, i.e. the “*amending delegated act*” in the mid-term review of the objectives/thematic priorities of individual beneficiary countries.

Pre-accession Assistance (IPA II)

More specifically, Council Regulation EC No 1085/2006 assistance expired at the end of 2013 in the case of the individual financial instrument Pre-accession Assistance IPA II which is part of the Budget for Europe 2020,. The framework for planning and delivering external assistance, in this case of external assistance for enlargement, is to be continued in the future. This is dependent on specific conditions: an applicant state can only become a member when it meets the membership criteria agreed upon in Copenhagen in 1993. These criteria include the stability of democratic institutions, the rule of law, human rights and respect and protection of minorities, and the existence of a functioning market economy. Candidate status (as of February 2014) has been granted to Iceland, Montenegro, Macedonia, Turkey and Serbia.

Assistance will be provided on the basis of country or multi-country indicative strategy papers of a duration of 7 years as part of the multiannual framework (Article 6). Progress in the achievement of specific objectives will be monitored and assessed (Article 2). The Commission makes annual assessments of the implementation of the strategic papers, informs and, if deemed necessary, sends proposed revisions to the IPA II committee consisting of representatives of the member states, chaired by the Commission (Articles 6 and 12). If considered necessary, there will also be a mid term review and possibly revision of the strategic papers at mid-term (Article 6.4).

In order to take account of changes in beneficiary countries, the Commission was given the power to adopt acts under Article 290 TFEU so that the thematic priorities for assistance listed in Annex II can be adapted and updated.²⁴ The implementation of the Regulation will

²⁴ Regulation EU No/....2014, IPA II, Article 10.

be exercised in accordance with Regulation EU No 182/2011 of the EP and the Council under Article 291 TFEU. They will be adopted through an examination procedure unless they are technical measures involving low-level finances (Article 11a).

The essential provisions of IPA II described above are the outcome of inter-institutional negotiations between the Commission, the Council and the EP; as pointed out above, for the first time this has been subject to the ordinary legislative procedure (co-decision)²⁵. Initially, the Commission proposed a common strategy framework for all types of action of assistance to all countries under pre-accession assistance which was to be subject to implementing acts under Article 291 TFEU. The EP opposed this on the grounds that this common strategy framework should be subject to a stand-alone delegated act under Article 290 TFEU. The amendments of the EP were rejected by both the Council and the Commission. In response, the EP offered to renounce delegated acts in the case of individual strategic papers but insisted on their requirement under the common strategy framework. This request was also rejected by the Council. The resulting deadlock in the decision-making process was overcome by deleting the proposal of a common strategy framework altogether. As a result, IPA II has only two levels of rules and no middle layer: the Regulation itself and the strategic papers describing the actions for individual countries.

In the case of strategic papers for individual pre-accession countries, the EP reintroduced its request to use delegated acts under Article 290 TFEU. The Council opposed the EP's proposals to the very last and only made some concessions briefly before all instruments expired in December 2013.²⁶ There was considerable political pressure resting on all actors involved to come to an agreement before the expiry of the instruments as well as to ensure that programming in beneficiary countries could start on time (or continue). In the end, a compromise was found by introducing an "amending delegated act" with regard to Annex II. More specifically, the EP ensured that Annex II of the Regulation, which contains a list of overall thematic priorities, can be amended by a mid-term "amending delegated act" if developments so require. In sum, the EP had to renounce its request to use delegated acts for all strategic papers, i.e. the common strategy paper, which was entirely dropped, but in return it was conceded that an "amending delegated act" can be used in the redefinition of thematic priorities in Annex II.

Moreover, while the EP had to renounce the use of stand-alone delegated acts with respect to strategic papers, it was also granted that a Strategic Dialogue be conducted with the Commission. This constitutes a *political (as opposed to legal) obligation* by the Commission. Under the Strategic Dialogue, in the preparation of strategic papers the Commission has the political obligation to take the EP's position into account when it is engaged in the programming process with beneficiary countries. This should allow the EP to hold the Commission accountable when formulating and implementing agreements with beneficiary

²⁵ Interview EP January, February 2014.

²⁶ Heading 4 (external relations) under the multiannual financial framework was one of the last to be approved at the end of 2013.

countries. “..The Commission will conduct a strategic dialogue with the EP prior to the programming of ...((financial instrument external relations...)).(It) will present to the Parliament the relevant available documents on programming with indicative allocations foreseen per country/region....The Commission will present to the Parliament the relevant available documents on programming with thematic priorities, possible results, choice of assessing modalities, and financial allocations for such priorities foreseen in thematic programmes. The Commission will take into account the position expressed by the EP on the matter. The Commission conducts a strategic dialogue with the EP in preparing the Mid Term Review and before any substantial revision of the programming documents during the period of validity of this Regulation.” (Commission Declaration to the Legislative Resolution).

To conclude, in view of the ambiguity of how Articles 290 and 291 TFEU should be employed in the case of the Financial Instruments IPA II, a compromise was struck in the negotiation process between the Commission and both the Council and the EP in which all actors involved made concessions. The institutional outcomes were the emergence of a new type of delegated act, i.e. the “amending delegated act” in the mid-term review of the thematic priorities of individual beneficiary countries and the introduction of the Strategic Dialogue between the Commission and the EP.

3.2 The contest of power between the Commission and national parliaments

In the next two case studies, we focus not only on the Commission, the Council and the EP, but also on additional institutional players, namely the national parliaments. This new actor became involved in the contest of how to apply delegated rule-making through the subsidiarity review procedure in Protocol No 2 to the Lisbon Treaty. As part of this procedure, a national parliament may issue a reasoned opinion within eight weeks from the date of transmission of a draft legislative act, stating why it considers that the draft in question does not comply with the principle of subsidiarity.²⁷ Each national parliament is equipped with two votes; in the case of a bicameral parliament, each of the two chambers has one vote.²⁸ If the number of issued reasoned opinions represents at least one-third of all the votes allocated to the national parliaments, or one-fourth of these votes in case of proposals in the area of freedom, security and justice, the Commission has to review its proposal and may consequently decide to maintain, amend or withdraw the proposal.²⁹ The jargon for this procedure is the ‘yellow card’. Moreover, national parliaments may trigger an ‘orange card’ under the ordinary legislative procedure, if the reasoned opinions account for at least a simple majority of the votes allocated to national parliaments.³⁰ Again, the Commission reviews its proposal and may decide to maintain, amend or withdraw it. If it is maintained, the Council (55% majority) or the EP (majority of the votes cast) may stop the legislative procedure.

²⁷ Art 6 of Protocol No.2. Reasoned opinions are available at www.ipex.eu.

²⁸ Art 7(1) of Protocol No.2.

²⁹ Art 7(2) of Protocol No.2.

³⁰ Art 7(3) of Protocol No.2.

The reasoned opinions of national parliaments not only assess the subsidiarity principle, but also other elements of the Commission proposals, and therefore go beyond the strict wording of Protocol No.2.³¹ One of the elements of Commission proposals that national parliaments take into account in their reasoned opinions are the delegations to adopt delegated or implementing acts. Hence, in the following two case studies we analyse first the reaction of national parliaments to the delegations included in the Commission proposals for the new data protection legislation and new tobacco products directive. Next, we look at the willingness of the Commission to take the opinions of parliaments into account. Both case studies examine the preferences of the Commission, Council and the EP for legislation or delegation of power, yet the legislative procedure in the case of the data protection proposal is still underway. Subsequently, within delegation, we look at the choice between delegated and implementing powers. We also inquire into the extent of delegation preferred by different actors. Finally, we identify the outcomes of the choice of rule, legislation or delegation, delegated act or implementing act and compare them to the original preferences of the national parliaments.

Based on the assumption made above that actors choose the institutional rule that maximises their institutional power in order to wield the highest possible influence on policy outcomes, we indicate the following situational preferences that actors hold in these cases. For the purpose of these case studies, we treat parliamentary chambers as unified actors with a preference for legislation, and if delegation is chosen, for delegated acts (Article 290).

National parliaments will prefer legislation, because it allows for the greatest control over the outcome. More specifically, the Lisbon Treaty granted national parliaments new powers in the EU legislative procedure, but no competences under Articles 290 and 291 TFEU. These provisions empower the Commission to the greatest extent; hence, as argued above, we assume that the Commission's preference is for extensive delegation. The EP will favour legislation over delegation as it can shape the basic legislative act more than delegated or implementing acts. Under delegation, it can only revoke or object to the delegation with regard to delegated acts. Finally, we assume that the Council will choose delegation, and in the context of delegation will prefer implementing acts, as it provides representatives of the member states with influence in the committees.

Case 3: Data Protection Legislation

In January 2012, the Commission proposed a new legal framework for the protection of personal data in order to reinforce the individual's fundamental right to data protection.³² The proposal consists of a directive³³ and General Data Protection Regulation.³⁴ Both draft acts contain a considerable number of delegations to adopt delegated and implementing acts.³⁵

³¹ Federico Fabbrini and Katarzyna Granat "“Yellow card, but no foul”: The role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike" *Common Market Law Review* 50(1), (2013): 115.

³² Communication from the Commission, Safeguarding Privacy in a Connected World. A European Data Protection Framework for the 21st Century, COM (2012) 09.

³³ Proposal for a directive of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation,

National parliaments scrutinised both proposals within the subsidiarity review procedure. As a result, the Belgian *Chambre des Représentants*, the French *Sénat* and the Italian *Camera dei Deputati* issued a reasoned opinion on the proposed regulation, while the German *Bundesrat* and the Swedish *Riksdag* issued an opinion on both the regulation and the directive. Especially the reasoned opinions related to the draft regulation criticised the use of delegated and implementing acts by the Commission, among other issues.

The most important criticism concerned the large number of delegations³⁶ allowing for ‘practically full authority to adopt delegated acts relating to almost every one of the most important elements’ of the proposal.³⁷ In the view of the German *Bundesrat*, the amount of delegated acts goes beyond Article 16(2) TFEU, which provides that a comprehensive regulation of data protection can only be made by the EU legislator.³⁸ Along similar lines, the Swedish *Riksdag* argued that the consequence of the transferred powers is that the Commission has been given a legislative role replacing legislators and courts.³⁹ In the same vein, the Belgian *Chambre des Représentants* favoured a comprehensive regulation instead of the use of executive acts, in order to ensure the participation of all institutions, the Parliament and the Council.⁴⁰ Finally, the French *Sénat* distinguished between issues which demand regulation by the EU legislator (eg ‘the right to be forgotten’ expressed in Article 17 of the proposal) and other issues to be decided at the national level.⁴¹

In line with the Commission's preference for delegation, it replied that delegations by means of delegated acts do not concern any essential element of the act proposed and that the duration of their validity is limited.⁴² Moreover, the Commission's reply to the German *Bundesrat* and the Belgian *Chambre des Représentants* also maintained that more detailed rules instead of delegated acts ‘would result in an inflexible and unwieldy legal text which would not be open to innovation and new technologies.’ In the Commission’s view, the regulation was ‘deliberately drafted as a technologically neutral legal instrument,’ ‘to anticipate all technological developments of the next twenty years,’ so the regulation can be supplemented without resorting to a revision of the regulation itself in every case.⁴³ As to

detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, COM (2012) 10.

³⁴ Proposal for a regulation of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, COM (2012) 11.

³⁵ Arts 56 and 57 of the draft directive and Arts 86 and 87 of the draft regulation.

³⁶ Reasoned opinion of the French *Sénat* on COM (2012) 11, 4.03.2012.

³⁷ Reasoned opinion of the Italian *Camera dei Deputati* on COM (2012) 11, 4.04.2012.

³⁸ Reasoned opinion of the German *Bundesrat* on COM (2012) 11, 30.03.2012, point 3.

³⁹ Reasoned opinion of the Swedish *Riksdag* on COM (2012) 11, 30.03.2012.

⁴⁰ Reasoned opinion of the Belgian *Chambre des Représentants* on COM (2012) 11, 6.04.2012, p.14. Criticism concerned Art 62 of the proposal setting the requirements for Commission implementing acts in the consistency mechanism.

⁴¹ Reasoned opinion of the French *Sénat* on COM (2012) 11, 4.03.2012, p. 3

⁴² Commission reply to the German *Bundesrat*, 10.01.2013, point 4; Commission reply to the Belgian *Chambre des Représentants*, 7.5.2013, p.3.

⁴³ Commission reply to the Italian *Camera dei Deputati*, 21.02.2013.

delegation under implementing acts, the Commission explained that it has been proposed for the technical and practical aspects which demand uniform implementation.⁴⁴

During the first reading of the proposal, the EP did not mention the points raised by national parliaments with regard to delegated rule-making directly. For example, with regard to the delegated acts concerning the right to be forgotten, a problem raised by the French chamber, the EP added that the Commission may adopt delegated acts in this respect, ‘after requesting an opinion of the European Data Protection Board.’⁴⁵ Similar rule was included with regard to the adoption of implementing acts by the Commission expressed in Article 62 of the proposal on the consistency mechanism. Whilst during the debate on the proposal, only one MEP raised the issue of the number of delegated acts,⁴⁶ in line with the EP’s preference for legislation the EP decreased the number of delegations by means of delegated acts in the proposal (out of 26 delegations remained six and a number of delegations by means of implementing acts was changed into delegated ones).⁴⁷ Also in line with the EP’s preference for delegated acts within the delegated rule-making, the number of delegations to adopt implementing acts has been drastically decreased (out of 22 only one remained).

In its most recent position, the Council deleted delegation by means of delegated acts in the cases mentioned by national parliament’s reasoned opinions; with regard to the right to be forgotten and some of the delegations by means of implementing acts in Article 62 of the proposal.⁴⁸ Yet the Council did not acknowledge any role of the reasoned opinions of national parliaments in this regard. In general, following its preference for delegation the Council’s position left more of the dispositions for delegated and implementing act than the first reading of the EP (out of 22 delegations by means of implementing acts remained nine and out of 26 delegations by means of delegated acts six were left).

In conclusion, this case shows that national parliaments became new actors in delegated rule making due to the ambiguity in the application of Article 290 and 291 TFEU, and consequently attempted to influence delegation. However, national parliaments play a very limited role because they may only react within the subsidiarity review procedure. Moreover, under Protocol No. 2, the Commission is not obliged to introduce changes in its proposal unless required by the EP and the Council within the ‘orange card’ procedure. Finally, the preference of the Commission for delegation over legislation reduced the chances national parliaments being able to change the delegations. It seems however, that the concern of national parliaments about the total number of delegations is shared by the EP and the Council and it remains to be seen whether the final act will maintain this approach.

Case 4: Tobacco Directive

⁴⁴ Commission reply to the Belgian Chambre des Représentants of 7.5.2013, p.3; Commission reply to the French Sénat of 14.11.2012, p.2.

⁴⁵ European Parliament, Amendment 112, P7_TA-PROV(2014)0212.

⁴⁶ European Parliament, 13. Protection of individuals with regard to the processing of personal data - Processing of personal data for the purposes of crime prevention (debate), 11.03.2014. See the contribution of MEP Franz Obermayr,

⁴⁷ European Parliament, Amendment 200, P7_TA-PROV(2014)0212.

⁴⁸ Council Document 11028/14, 30.06.2014.

The Tobacco Directive case focuses on a new tobacco products directive that updates and replaces the current legislation in this field.⁴⁹ The novelty of the Commission proposal concerns issues such as enlarging the size and the position of health warnings, prohibition of flavourings, ban on slim cigarettes and the regulation of e-cigarettes.⁵⁰

The legal basis of the proposal is Article 114 TFEU, which demands the ordinary legislative procedure for approximation of laws of member states for the establishment and functioning of the internal market. Accordingly, in June 2013 the Council issued a general approach⁵¹ and the EP voted on the amendments to the proposal in October 2013.⁵² After five trilogues, the institutions approved the text of the directive in December 2013 with a view to an agreement on this legislative proposal at first reading.⁵³ In March 2014 the Tobacco directive has been finally adopted.⁵⁴

The issue at stake is the large number of provisions empowering the Commission to adopt delegated (22) and implementing acts (4) incorporated in the Commission proposal.⁵⁵ The most important delegations based on delegated acts related to, firstly, the adaptation of standards for the maximum yields of ingredients and their measurement methods in accordance with scientific development and international standards. A second type of delegation aimed at setting maximum levels of additives that produce a characterising flavour. The third type of delegation referred to adapting the wording and the form of health warnings to scientific and market developments. Finally, with regard to e-cigarettes, the proposal conferred the Commission with the power to update the quantities of nicotine and the health warnings on these products by means of delegated acts.

With regard to implementing acts, the Commission proposed delegations to set and update the format for the submission of information by manufacturers and producers on ingredients and emissions of tobacco products and the dissemination of this information by member states. Moreover, the Commission was given power to adopt uniform rules by means of implementing acts to determine whether a tobacco product has a characterising flavour and

⁴⁹ Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products, COM (2012) 788.

⁵⁰ Matthew J. Elsmore and Viktoria Obolevich, 'Thank you for not smoking: the Commission's proposal for a new Tobacco Products Directive - legally sound, but does it hit the spot?', *European Law Review* 38(4), (2013): 552.

⁵¹ General approach, Council Document 11483/13, 24.06.2013.

⁵² Amendments adopted by the European Parliament on 8 October 2013, P7_TA(2013)0398.

⁵³ Council document 17727/13 of 17.12.2013 (analysis of the final compromise with the view to an agreement) and Council document 17727/13 of 20.12.2013 (after the agreement of the Permanent Representatives Committee).

⁵⁴ Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, OJ L 127 29.04.2014, p. 0001. The EP adopted its position at first reading on 26.02.2014 and the Council adopted the Tobacco Directive on 14.03.2014 (See Council Press Release 7763/14). In this chapter we refer mostly to the EP and Council positions before reaching the agreement by these institutions at first reading, which allows for better following of their preferences. The shape of delegations reached in the compromise text was later reflected in the final text of the acts. See EP document of 26.02.2014 P7_TA(2014)0160.

⁵⁵ The numbers express the total number of delegations in the proposal as some of the provisions contained more than one delegation.

whether a tobacco product contains additives that increase its toxic or addictive effects at the stage of consumption.

Several national parliaments reacted critically to the Commission's directive proposal within the subsidiarity review procedure under Protocol No.2. Nine parliamentary chambers in total issued a reasoned opinion stating a violation of the subsidiarity principle: the Portuguese *Assembleia da República*, the Danish *Folketing*, the Hellenic *Vouli ton Ellinon*, the Swedish *Riksdag*, the Bulgarian *Narodno sabranie*, the Czech *Poslanecká sněmovna*, the Italian *Senato* and *Camera dei Deputati* and the Romanian *Camera Deputailor*.⁵⁶

Even though the procedure under Protocol No. 2 concerns only the scrutiny of the subsidiarity principle, the ambiguity in the rules regarding the exercise of delegated powers enshrined in Article 290 TFEU prompted a strong reaction from national parliaments.⁵⁷ The implemented acts seemed less problematic;⁵⁸ this is due to the fact that the Commission is assisted in the shaping of implementing acts by the committees composed of representatives of the member states. Therefore, the attention of national parliaments focused on delegated acts, under which the Council and the EP have 'only' an ex post right of objection and revocation. The Greek *Vouli ton Ellinon*, the Italian *Senato*, the Czech *Poslanecká sněmovna* and the Bulgarian *Narodno sabranie* claimed that the proposal empowers the Commission to adopt delegated acts with regard to essential elements of the proposal.⁵⁹ Thus, the Bulgarian parliament disputed the application of delegated acts concerning the maximum tar, nicotine, carbon monoxide and other yields, regulation of ingredients, health warnings and appearance and content of unit packets.⁶⁰ In addition to the points raised by the Bulgarian chamber, the Italian *Senato* criticised delegations with regard to the e-cigarette.

Besides the delegation of essential elements, national parliaments criticised the large number of empowerments to adopt delegated acts within *one* legislative act. The Czech, Hellenic, Romanian and Italian chambers objected to the fact that the Commission proposal provided for such an extensive transfer of powers to the Commission to adopt non-legislative acts on substantial provisions within one act.⁶¹ Additionally, the Bulgarian parliament and the Italian *Senato* objected to the unlimited duration of the empowerment to adopt delegated acts.

In their reasoned opinions, national parliaments underlined the consequences of such a power transfer to the Commission. Accordingly, the Danish *Folketing* considered the delegations of power to be a hurdle for national parliaments when seeking to monitor the compliance of proposals with the principle of subsidiarity and the consequences of the directive.⁶² Additionally, the Italian *Senato* claimed 'an excessive and unjustified' conferral of power on the Commission that encroached on the competence of national Parliaments by denying them

⁵⁶ These opinions represented together only 14 votes out of the 18 required to raise a yellow card (at least one-third of 56 votes).

⁵⁷ Except for Swedish and Portugal chambers and Italian Camera dei Deputati.

⁵⁸ The German Bundesrat, which replied to the Commission proposal within Barroso's 'political dialogue' as the only chamber referred to the delegation to adopt the implementing acts.

⁵⁹ The Hungarian parliament and the Czech Senat raised similar issue within the Barroso 'political dialogue'.

⁶⁰ Similar points were also raised by the Hungarian parliament within the political dialogue.

⁶¹ The Slovak Národná Rada raised this issue within the political dialogue.

⁶² Reasoned opinion of the Danish Folketing on COM (2012) 788, 4.03.2013, p. 3.

the possibility to assess the subsidiarity and proportionality of the delegated acts.⁶³ Finally, in the view of the Bulgarian chamber, the approach presented in the proposed directive deprived the Member States of ‘the opportunity to implement a policy tuned to their national specificities and societal and cultural differences, in accordance with national health policies’.⁶⁴

In line with the Commission's preference for delegation, it gave a very succinct reply to the concerns of national parliaments rebutting all their arguments against the proposed delegated powers.⁶⁵ More specifically, the Commission defended the power to adopt delegated acts as necessary in order to make this directive fully operational in the view of technical, scientific and international developments in the tobacco manufacture, consumption and regulation.” The Commission further maintained that the delegations of power provide for “clear and concise criteria, giving limited discretion to the Commission.” Moreover, the Commission ensured involvement of the Member States in the preparation of the delegated acts and simultaneous transmission of relevant documents to the EP and Council. In sum, due to the fact that the subsidiarity procedure does not empower national parliaments to block the legislative procedure, the Commission may unilaterally impose the conditions of delegation. Consequently, parliament’s role in shaping delegated and implementing acts is limited even in cases when they trigger a “yellow card”.

As to the contest between legislation or delegation, we argued above that *under the ordinary legislative procedure, the Commission and the Council will prefer delegated powers, whilst the European Parliament will opt for legislation*. Accordingly, in the case of the directive on the tobacco products, the Commission proposed a large number of delegations which expressly empower the Commission. The Council also favoured delegations. The EPSCO Council’s general approach shows that the Council reduced only two of the delegations by means of delegated acts⁶⁶ and added new provisions with delegations.⁶⁷

In the EP, a number of MEPs raised concerns during the plenary vote on amendments about the broad scope of delegated acts envisaged in the Commission proposal and underlined that the delegations concerned essential elements of the proposal.⁶⁸ As a result, the EP upheld only less than a half of the delegated acts foreseen by the Commission, removing the controversial provisions on the characteristic flavourings, shape of unit packets and nicotine-

⁶³ Reasoned opinion of the Italian Senato on COM (2012) 788, 30.01.2013, p. 1-2; Reasoned opinion of Bulgarian Narodno sabranie on COM (2012) 788, 28.02.2013, point 3.

⁶⁴ Reasoned opinion of Bulgarian Narodno sabranie on COM (2012) 788, 28.02.2013, point 3.

⁶⁵ Reply of the Commission to the Italian Senato (25.06.2013) and the Camera dei Deputati (28.5.2013), the Greek parliament (25.06.2013), the Romanian parliament (18.6.2013), the Bulgarian parliament (18.7.2013) the Danish Folketing (25.06.2013), the Czech Poslanecká sněmovna and the Romanian Camera Deputailor (18.6.2013). The opinions issued in the political dialogue received a similar reply from the Commission.

⁶⁶ Arts 9.3d and 13.3 of the proposal.

⁶⁷ Cf. Council Document, 11483/13 of 24.06.2013, Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products (First reading) – General approach.

⁶⁸ European Parliament, 5. Manufacture, presentation and sale of tobacco and related products (debate), 8.10.2013.

containing products.⁶⁹ With regard to one delegation, the EP directly regulated details of text warnings for tobacco products in the legislative act.⁷⁰

The final text of the directive shows that the opinions of national parliaments have not been shared by the Commission. The views of national parliaments did, however, find some support within the EP and the Council in relation to the duration of the delegation. The EU legislator proposed that delegations should be limited to five years. As to the mode of delegation under delegated acts or implementing acts, only the delegated act on detailed rules for the shape and size of unit packets,⁷¹ to which national parliaments objected, was deleted by both the EP and the Council. Nonetheless, we cannot empirically ascertain the influence of national parliaments as neither the Council nor the EP referred directly to national parliaments as the source of influence for introducing these changes.

As to the high number of delegations, the EP also opted to limit the number of delegations but did not directly invoke the arguments of national parliaments. This specific objection of national parliaments did not find support in the Council; the final legislative act contains a high number of delegations to adopt delegated acts. This might be due to the fact that Bulgaria, the Czech Republic, Poland and Romania were in the opposing minority in the Council and hence their views were not taken into account in the general approach.⁷²

In sum, the text of the directive remained closest to the Commission's and Council's preference for delegation, whereas the EP's preference for legislation, expressed in the limits placed on the number of delegations, was not generally shared.⁷³

Turning to the choice of a type of delegation that depended on the relative institutional power under the two forms of delegation, i.e. delegated or implementing acts, we assumed that the EP prefers delegated acts, whereas the Council prefers implementing acts. The general approach adopted in the Council introduced a number of amendments concerning delegated and implementing powers. As mentioned earlier, with regard to delegated acts, the Council removed only two delegations by means of delegated acts in their entirety⁷⁴ and moved another to the main body of the directive,⁷⁵ whilst limiting the scope of some other delegations. However, the Council did not introduce far-reaching limitations with regard to implementing acts. In fact, it advanced two new delegations to adopt implementing acts.⁷⁶

⁶⁹ European Parliament amendments, P7_TA(2013)0389.

⁷⁰ Art 8.3. Similar to the Council in General approach.

⁷¹ Art 13.3 of the proposal.

⁷² House of Commons, 13th Report of the European Scrutiny Committee, p. 1.9, available at <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xiii/8302.htm>.

⁷³ One exception exists. The EP's request for deletion of delegated act in Art 13(4) has been followed in order to finalize the agreement on the directive. Cf. Council document, 17727/13 of 17.12.2013, Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products (First reading) (Legislative deliberation) – Analysis of the final compromise text with view to an agreement, p.2.

⁷⁴ Arts 9.3d and 13.3, Council document 11483/13.

⁷⁵ New Art 8.4a.

⁷⁶ New Arts 6.2b and 14.8a

Additionally, as many as four delegations by means of delegated acts were replaced by implementing acts.⁷⁷ These changes confirm the Council's preference for implementing acts.

Whereas the EP eliminated a very large number of delegations by means of delegated acts, it also added one new delegation of this type, namely on the procedure to obtain approval on additives by manufacturers and importers.⁷⁸ Meanwhile, it deleted all delegations to adopt implementing acts except for one.⁷⁹ These choices of the EP confirm what we have argued earlier, namely that within delegation the EP prefers delegated acts.

Finally, the agreed text of the directive is closest to the preferences of the Council and the Commission (for the implementing acts) in that the institutions agreed to change some of the delegated acts into implementing ones, and added implementing acts proposed earlier by the Council and three new implementing delegations.⁸⁰ A particularly interesting instance concerns the procedure for the approval of additives by the Commission. In this regard, the EP proposed in the amendments voted in October 2013 that this procedure would be established by the Commission by means of delegated acts.⁸¹ However, the agreement reached by the institutions modified the procedure proposed by the EP. The compromise solution provides that the Commission may set by means of implementing acts a 'priority list' of additives allowed in cigarettes and roll-your-own tobacco subjected to re-enforced reporting obligation by manufacturers or importers.⁸²

As to the contest about the extent of delegation and as stated earlier, the Council indicates a preference for implementing acts whereas the EP chooses delegated acts, thus conforming to their comparatively more far-reaching powers in each of the cases. Hence, the Council will be more willing to limit the scope of delegations by means of delegated acts and the EP will prefer to limit the extent of delegations by means of implementing acts. In the Tobacco case, the Council has limited the scope of some delegations by means of delegated acts. For example, the Council decided in its general approach that with regard to the nicotine-containing products, the Commission may only adapt the wording of the health warnings, but not their position, format, layout, design and rotation.⁸³ In sum, the Council followed its institutional preference for limitation of delegated acts as explained above.

In contrast to the Council, the EP deleted most of the delegations under implementing acts. It was only with regard to the labelling of smokeless tobacco products that the EP introduced limitations in the scope of delegation similarly to the Council.⁸⁴ Consequently, the expectation that the EP will limit the extent of delegations based on implementing acts is confirmed by the fact that the EP decided to almost completely eliminate them.

⁷⁷ Arts 9.4, 14.8b-c, and 14a.2.

⁷⁸ Art 6.10a, P7_TA(2013)0389.

⁷⁹ Art 5.3.

⁸⁰ Art 5(1a) on additives, Art 8(6) on position of health warning in roll on tobacco and Art18(11) on the notification format for the electronic cigarettes and refill containers, Council document 17727/13.

⁸¹ Art 6.10a, P7_TA(2013)0389.

⁸² Art 5.1a (new), Council document 17727/13.

⁸³ Art 18.5, Council document 11483/13.

⁸⁴ Art 11.3, P7_TA(2013)0389.

Finally, both the Council and the EP proposed that the power to adopt delegated acts should be conferred on the Commission for a limited time period of five years, and demanded a report from the Commission in respect of the delegation of power nine months before that date. This amendment proposed by both institutions is in line with the Common Understanding. In sum, the changes in the scope of delegated acts introduced by the Council were largely followed in the agreement reached among the institutions.

To conclude, the existing formal rules in Articles 290 and 291 TFEU constitute ambiguous terms of contract and therefore trigger the scrutiny of national parliaments under Protocol No. 2, originally directed at the review of the subsidiarity principle. Also in the Tobacco case, the Commission did not change the delegations in the basic act despite the opinions of national parliaments. In the subsequent bargaining over the Commission proposal under the co-decision procedure, the participating actors followed their institutional preferences. Given the choice between legislation and delegation, the Commission opted for delegations whereas the Council approved of delegation but limited the scope of delegated acts or proposed implementing acts. By contrast, the EP opted for legislation, as manifested in the large amounts of deleted delegations. With regard to the choice between delegated acts and implementing acts, the Council chose implementing acts and the EP showed a preference for delegated acts once delegation was decided upon. Finally, the EP restricted the Commission's power in the remaining delegated acts by limiting the extent of these delegations in line with its preference for limiting delegation and using legislation. On the other hand, the Council limited delegation under delegated acts in favour of delegation under implementing acts. The agreement on the final text reached by the institutions shows that the Commission succeeded in keeping the majority of delegations intact. The Council succeeded in changing some of them into implementing acts and adding new ones. Compared with the other institutions, the EP's preferences are less reflected in the decision outcomes.

Finally, as described above, the Commission did not follow the arguments stated in the reasoned opinions of national parliaments. In addition, the final text of the directive contains a large number of delegations criticised by national parliaments. However, the EU legislators decreased the duration of the empowerment to adopt delegated acts in line with the expectation of some of the parliaments. Similarly, one of the delegations by means of delegated acts to which the national parliaments objected was deleted. Nonetheless, as neither the EP nor the Council mention the changes proposed by national parliaments, the role of national parliaments in shaping delegated legislation cannot be shown empirically.

4 Conclusion

Ever since the Lisbon Treaty introduced the new provisions on delegated rule-making under Articles 290 and 291 TFEU, the newly created institutional rules have been subject to change. Some of the changes have occurred upfront in the formal political arenas, and have been contested by the relevant actors, i.e. Council, European Parliament (EP) and Commission as well as national parliaments. By contrast, other changes have occurred in a more covert or invisible way, unfolding after the adoption of a formal rule in the course of its application. We are focusing on the latter type of 'interstitial' institutional change and its consequences

and ask ‘Under what circumstances does ‘interstitial’ institutional change occur after a formal rule has been adopted; what are its dynamics and its consequences?’

We define interstitial institutional change as informal institutional change which occurs between two formal rule revisions. Institutional change emerges once a formal political decision of integration has been taken that constitutes an incomplete contract. This offers the possibility of renegotiation and specification in the course of its application. The explanation is based on the assumptions of goal-oriented, boundedly rational actors, seeking to maximize their institutional power and thereby their power over policy outcomes. We hypothesize that *An incomplete institutional rule or policy may lead to an interstitial institutional change in the course of its application. In the renegotiation of the incomplete institutional rule, the preferences of the most powerful actors will be reflected in the substance of the modified interstitial institutional rule.*” In order to show the plausibility of our argument, we discuss four cases of institutional change resulting from ambiguities in institutional rules under Articles 290 and 291 TFEU.

The Lisbon Treaty distinguishes between legislative delegation and executive delegation and provides for two separate procedures for “delegated acts” and “implementing acts”. Under Article 290 TFEU, the Commission – by legislation – may be delegated the power to adopt “delegated acts” of general scope supplementing or amending certain non-essential elements of the legislation in question. The legislators must explicitly define the objective, content, scope and duration of this delegation. They can also choose the mechanism(s) used to control the Commission when it applies these delegated powers, revocation and objection. However, the new provisions of the Lisbon Treaty leave unanswered many questions as to how delegated acts (Article 290 TFEU) and implementing acts (Article 291 TFEU) should be applied. In other words the provisions constitute an incomplete contract.

The first case focuses on the conflict between the Commission, the Council and the EP in the definition of the economic indicators under the scoreboard regime under the preventive arm of the Prevention and Correction of Macroeconomic Imbalances. Some vague provisions were introduced in Regulation on the Prevention and Correction of Macroeconomic Imbalances that needed specification through delegated legislation. In the interpretation of these incomplete institutional rules, a conflict emerged over the choice of either delegated acts (Article 290 TFEU) or implementing acts (Article 291 TFEU). When deciding how to flesh out the scoreboard regime, i.e. the indicators used to measure and monitor macro-economic and macro-financial imbalances, the Commission first proposed to define these indicators on its own. When there was resistance from both the Council and the EP, the Commission proposed “delegated acts” together with the EP (Article 290 TFEU) whilst the Council wished to use an implementing act (Article 291 TFEU). A deadlock ensued which, after a round of negotiations, led to the use of an informal new type of procedure which is *neither* Article 290 TFEU nor Article 291 TFEU, the “compromise”. What emerges from our theoretical perspective of interstitial institutional change is that the existing formal rules constitute ambiguous terms of contract, which in the situation of a decision stalemate - were

re-bargained and transformed in such a way as to overcome the impasse. By so doing, the power of the Commission was clearly strengthened.

In the further application of the new institutional rule, it emerged however that the EP did not feel fairly treated by the Commission. This on-going struggle about the correct application of – in this case – already modified interstitial institutional rule (Recital 12) shows that the modified rule is in turn incomplete and offers opportunities to assert the relative institutional power of the actors involved, i.e. about how to apply the modified rule in a specific case.

The second case “Financial Instruments External Relations: Pre-accession IPA II,” refers to the issue that, under the Lisbon Treaty, External Relations were subject for the first time to the ordinary legislative procedure (previously the co-decision procedure), hence implying new powers for the EP. Consequently, in negotiating the specifics of Articles 290 and 291 TFEU in their application to External Relations all actors, the Commission, the Council or the member states and the EP were treading on institutionally new territory and very cautiously negotiated the specifics of the application of Articles 290 and 291 TFEU to the Financial Instruments External Relations Common Rule. The EP wished to employ delegated acts, while the Commission and the Council opted for implementing acts. In these negotiations, a compromise was struck in which all involved actors made concessions. The outcome was the emergence of a new type of delegated act, i.e. the “*amending delegated act*” in the mid-term review of the objectives/thematic priorities of individual beneficiary countries as well as a strategic dialogue between the Commission and the EP when defining strategic papers for individual member states.

The third case concerns the legislation (a directive and a regulation) proposed by the Commission on data protection. Especially the draft regulation contained a large number of delegations that empowered the Commission. In view of the ambiguity in the application of Articles 290 and 291 TFEU, national parliaments became new actors in delegated law making. Namely, national parliaments reacted to these proposals under the subsidiarity review mechanism introduced by Lisbon Treaty, overriding the strict wording of Protocol No.2 which demands a focus on the principle of subsidiarity violations. Their reasoned opinions highlighted the fact that the Commission proposals contain numerous delegations with far-reaching scope. Moreover, national parliaments signalled that these delegations grant the Commission far-reaching authority to adopt delegated acts with regard to the most important elements of this legislation.

As the number of opinions issued by national parliaments did not reach the “yellow” or “orange card” threshold, the Commission was not obliged to take any further steps to review its proposal. In its responses to national parliaments, the Commission rejected the arguments raised by national parliaments in line with its preference for delegation. In particular, the Commission replied that the delegations by means of delegated acts do not concern any essential element of the act proposed and that their period of validity is limited, allowing for more flexibility and openness to innovation and new technologies.

The fourth case concerns the new tobacco directive and like the third case focuses on national parliaments as a new player in delegated law-making. With regard to the Commission proposal for a new tobacco directive, national parliaments criticised the large number of empowerments to adopt delegated acts within *one* legislative act, often concerning essential elements of the directive, as well as the unlimited duration of these delegations. However, as in the case of data protection, the Commission remained firm on its position and rebutted the arguments of national parliament. In the subsequent bargaining over the Commission proposal under the co-decision procedure, the participating actors followed their institutional preferences. The preferences for delegation of the Commission and of the Council are taken most into account in the adopted text. The directive further contains a large number of delegations, which was one of the critical points raised by national parliaments. However, the EU legislator limited the duration of the empowerment to adopt delegated acts and deleted one of the delegations in accordance with the reasoned opinions of national parliaments. Hence, national parliaments have played some role in the delegated legislation in the tobacco case, but we cannot empirically show the impact of national parliaments as the EP and the Council have not acknowledged it formally.

In conclusion, the comparison of the four cases shows that the EP had real blocking power in the decision-making process in the first two cases and consequently was able to force the Commission and the Council to offer some concessions and obtain a modification of delegation rules in its favour. Given the conflicting preferences of the other two institutional actors, it did not achieve what it requested, i.e. the use of delegation acts, but it attained modified institutional rules of delegation in each case: the *compromise rule* in the case of Excessive Macro Economic Imbalances, and the *amending delegated rule* in the case of external relations.

By contrast, the national parliaments had no formal blocking power of a Commission decision draft and did not obtain any concessions from the Commission. Only with the support of one of the other European level institutional actors could it have wielded more leverage, as in the case of some issues highlighted by national parliaments in the tobacco directive.

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